resources between SBC and its affiliate so as to place the affiliate in a competitively superior position vis a vis unaffiliated entities. Moreover, the appropriate residence of assets and activity is so vague as to permit SBC to manipulate ownership and control of the relevant assets and activities and thereby evade any non-discriminatory access obligations that would theoretically attach. Specifically, SBC and its affiliate may separately own some but not all pieces of equipment identified as advanced services equipment (DSLAMs, splitters, packet switches, modems, etc.). This will allow SBC to divide control over key assets between a regulated and (ostensibly) unregulated subsidiary, allowing control of the assets to be manipulated to evade access obligations altogether. Also, SBC and its affiliate may, inter alia, jointly market the services (including the completion of orders) of the other on an exclusive basis, and provide certain follow-up services for the other. Proposal ¶ 27.a. The affiliate may also use on an exclusive basis the ILEC's name, trademarks and service marks, and its employees may work on the same floors of the same buildings as the ILEC's employees. Id. ¶ 27.d-e. Here, too, the degree of separation is inadequate to ensure non-discriminatory access to essential xDSL inputs.

As discussed earlier, Section 272 separation is predicated upon the existence of Section 271 market-opening, procompetitive conditions and should not be adopted without first realizing similar competitive conditions. Even assuming Section 272-type measures could be implemented without the existence of such competition, Section 272 obligations must be adopted in their entirety to have meaning. As such, SBC and its affiliate must jointly market on a non-discriminatory basis only consistent with Section 251(g) and 272(g). See Non-Accounting Order ¶¶ 287, 292-93 (discussing joint marketing non-discrimination obligations). In addition, SBC and its affiliate must not be permitted to conduct customer care activities such as "service representative interaction with the customer after the sale" (Proposal ¶ 27.a) or any similar sharing of resources unless it is done on an arm's length basis. See Non-Accounting Order ¶ 158 (requiring arm's length transactions).

3. Transfers of Assets

SBC proposes a "grace period" for the exclusive transfer of assets to its affiliate. Proposal ¶ 28. Such transfers may unfairly advantage SBC's affiliate vis a vis unaffiliated providers of advanced services. This could occur because, like the permissive ownership provision discussed above, the proposal leaves it within SBC's discretion to transfer assets as it sees fit. Moreover, the proposal fails to specify that transfers of advanced services' equipment are subject to the affiliate transactions rules, see 47 C.F.R. § 32.27, potentially resulting in SBC's monopoly ratepayers subsidizing the affiliate (and thereby harming unaffiliated advanced services' providers) to the extent the affiliate does not pay fair market value for the assets. The Commission must clarify that any transfers of assets from SBC to the affiliate would be subject to the affiliate transaction rules. See Non-Accounting Order ¶ 218 (prohibiting exclusive transactions entirely).

4. Exclusive Functionality Provisioning and Line Sharing

SBC's proposal provides for exclusive provisioning of advanced services functionalities[22] and interim line sharing for its affiliate for set periods of time. The interim period for this technical exclusivity ends at the following times: for the advanced services functionalities, six months after the affiliate has all necessary authorizations in a particular state; for the DSLAM functionality of line sharing, when it becomes "technically and commercially feasible" to provide such capability to all providers; and for line sharing, when it becomes "technically feasible" and the necessary equipment becomes available at "commercial volumes." See Proposal ¶¶ 27, 33.

Broadly, the proposal's line sharing provisions are anticompetitive because they perpetuate SBC's voice monopoly, they set the affiliate on unequal terms vis a vis unaffiliated providers, and they are so vague as to be "enforceable" by anyone other than SBC. See Non-Accounting Order ¶ 218 (prohibiting exclusive transactions). The

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[22] Proposal ¶ 27.

instances in which these services must be provided to third parties -- when "technically feasible," "commercially feasible," and available at "commercial volumes" -- provide fertile ground for endless litigation and regulatory review. And since SBC is permitted to provide advanced services to its affiliate during an interim period whose duration is in SBC's own control, it will be able to capture market share without obtaining new equipment to upgrade its systems to make line sharing or DSLAM functionalities available to all providers. Thus, the proposal creates serious anticompetitive incentives almost certain to delay the deployment of new technologies in order to benefit the SBC "separate subsidiary." The Commission should simply reject these provisions as offered.

SBC's interim line sharing arrangements are anticompetitive and should not be adopted. SBC must be required to eliminate the proposed anticompetitive limitations for availability of loops subject to the "Surrogate Charge." <u>See</u> Proposal ¶ 34. Specifically, unaffiliated providers are required to use the discounted loops to provide advanced services only (<u>e.g.</u>, no provision of voice service), SBC must serve on a retail or wholesale basis the voice needs of the end-user served by a loop subject to discounts, and unaffiliated providers' advanced services must be within a "compatible" spectral map as determined by SBC. Proposal ¶ 34.[23]

These limitations serve only to protect SBC from more efficient alternatives, e.g., bundled voice and data offerings like Sprint ION. Specifically, SBC's voice prohibition on discounted loops is simply unnecessary and functions only as a measure to protect its voice monopoly.

In addition, SBC's spectral map "compatibility requirement" is similarly anticompetitive. As the Commission concluded recently, "incumbent LECs should [not] have unfettered control over spectrum management standards and practices." Advanced Services Order ¶ 63. SBC's adoption of a proprietary standard that it may change at will is no more than an attempt to take a second bite at the apple and gain authority that the Commission has already denied. This cannot be permitted. Rather, the Commission must require SBC to participate in any standards setting process and to comply with any standards adopted by the industry and the Commission.[24]

Finally, a CLEC loses its eligibility for the loop discount in a particular state either upon a finding by the

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[23] This spectral map "compatibility" standard references SBC's technical publication, TP-76730, which contains proprietary standards that can be unilaterally modified at any time.

[24] Assurances that SBC's technical publication is compliant with existing standards are insufficient to protect CLECs from future abuses.

Commission or the state PUC that the CLEC violated the use restrictions, or if the CLEC "fails to cooperate in an audit." Proposal ¶ 34.e.[25] The CLEC loses its discount with respect to both the loop in question as well as all other loops it has ordered. Id. Given that the use restriction itself is contrary to the public interest, it is hardly a valid use of public resources to have the FCC and state PUCs police and enforce it. Further, this provision appears to vest authority in SBC since it appears to empower SBC to determine, without the assistance of the Commission or the appropriate state commission, that a CLEC has "failed to cooperate" in an audit. It is flatly illegal to allow a private party to unilaterally resolve inter-carrier disputes.[26] Once again, SBC is seeking to "game" the FCC's processes here, by adopting "conditions" that, rather than providing any real restraints, will actually enable SBC to establish precedents that will advance its anticompetitive goals and thereby protect its existing monopoly.

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[25] Compare Proposal ¶¶ 46.f, 48.e (containing loss of eligibility provisions for other "promotions" but requiring finding of governmental agency).

[26] See National Ass'n of Reg. Util. Comm'rs v. FCC, 737 F.2d 1095, 1143 (D.C. Cir. 1984) (holding that the FCC "cannot, of course, cede to private parties such as the exchange carriers either the right to decide contests between themselves and their opponents or even the opportunity to narrow the margins of the debate . . .").

5. Termination of Advanced Services Affiliate Conditions

SBC's proposed requirements concerning an advanced services affiliate end three years after the merger closing (or four years with respect to line sharing and advanced services OSS discounts). Proposal ¶¶ 39-40. The proposal specifies the possibility of an earlier termination date, however: "[t]he requirements of this Section VII . . . shall terminate immediately upon . . . the Commission modif[ying] its rules and regulations in a manner that materially changes the substance of what is covered in this Section VII." Id. ¶ 39.b. This language does not specify who would be tasked with interpreting the vague "material change" standard, and fails to explain whether the "material change" language applies to Section VII only, or to advanced services generally. This vagueness potentially permits SBC to terminate the provisions of Section VII unilaterally and thereby deny any certainty unaffiliated providers need concerning, inter alia, loop discounts in order to incorporate those prices as an element of an entry strategy.

The proposal also fails to specify how SBC or its affiliate would provide advanced services after the termination of Section VII's provisions. For example, would the affiliate remain separate, would the services lapse back to the ILEC, and would they be subject to dominant or non-dominant regulation?

D. Access to Unbundled Network Elements

The Applicants state that they will continue to provide unbundled network elements ("UNEs") in the SBC and Ameritech states in accordance with the commitments made by SBC in a February 9, 1999 letter and by Ameritech in a February 11, 1999 letter to Lawrence E. Strickling, Chief, Common Carrier Bureau. Id. ¶ 43 & Att. D. These letters were filed after the Supreme Court's decision in AT&T Communications v. Iowa Utilities Board, which vacated the FCC's regulation setting forth the seven network elements that ILECs were required, at a minimum, to unbundle. The Supreme Court's decision, while reinstating some clarity, also put into doubt the UNE obligations of the ILECs pending the remand decision by the FCC and subsequent appellate proceedings. In apparent recognition of the uncertainties attaching during the transition to final FCC rules, the FCC sought voluntary assurances of UNE availability from the largest ILECs.

A review of these commitment letters reveals just how inadequate the proposed condition is. For example, SBC agrees to provide access to UNEs during this interim period only "until the parties mutually agree to alternative provisions or alternative provisions are approved through the regulatory and judicial process." SBC Letter at 1. Further, SBC expressly retains the ability to retaliate if a competing carrier seeks to modify its interconnection agreement to reflect other changes wrought by the Iowa Utilities Board decision. See SBC Letter at 1 ("in the event other parties to our existing interconnection agreements attempt to invalidate these agreements based upon Iowa Utilities Board, [SBC] reserve[s] the right to respond as appropriate without regard to this commitment"). Further, rather than agreeing to offer the same UNEs during current negotiations, SBC merely recites its statutory obligation to "continue to negotiate in good faith with any party seeking to enter into a new local interconnection agreement." SBC Letter at 1. This "commitment" in reality constitutes nothing more than what SBC is already legally required to do under Section 252(a).

As demonstrated, relying on the parties' commitment letters from February is wholly inadequate to ensure CLECs continuing access to UNEs. Accordingly, Sprint urges the Commission to make clear that, prior to closing and pending the FCC's decision on remand from AT&T Corp. v. Iowa Utilities Board, until such rules have become Final,[27] each ILEC (defined as the operating companies of the merging parties) shall offer and provide access to each of the UNEs identified in 47 C.F.R. § 51.319. Moreover, the Commission should require that such access be made in accordance with the rules as promulgated in the Local Competition Order, 11 FCC Rcd. 15499 (1996), and reinstated by the Supreme Court. These requirements would minimize disruption pending a Final Commission decision.

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[27] "Final" as used should include the time in which all rehearing and appellate proceedings are completed.

Alternately, to the extent that the Commission decides to rely on SBC's and Ameritech's commitment letters, the Commission should require SBC, at a minimum, to abide by Ameritech's commitments, which, while problematic, are nonetheless superior to SBC's.[28] Such a requirement would extend Ameritech's "best practice" response to the Commission's request for assurances to the merged entity.

E. UNE-P Availability/Promotion

SBC's offer includes a commitment to provide the UNE-Platform service (end-to-end combinations of UNEs) ("UNE-P") only for very small number of residential lines, and only for a limited amount of time. See Proposal ¶ 48. SBC has taken a legal obligation, derived directly from congressional policy, and distorted it into a self-congratulatory "promotional opportunity." UNE-P should not be viewed as a "promotion"; it is a legal obligation of the ILECs. The proposed condition fails to counteract in any substantial way the ILECs' ability and incentive to exploit the uncertainty created by the Supreme Court's remand, and

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[28] For example, Ameritech agreed "not to exercise its right to eliminate access to network elements in its existing agreements." Ameritech Letter at 1. Ameritech also agreed to allow CLECs to opt into existing agreements under Section 252(i), even if those agreements include terms and conditions allowing access to the seven UNEs required by the now vacated Rule 319. Id. Finally, Ameritech stated that it will continue to negotiate with carriers in good faith access to those UNEs "at rates and on terms and conditions comparable to those contained in Ameritech's existing interconnection agreements." Id.

cuts off a significant form of entry by competitors desiring to serve residential or business customers.

The limitation of the UNE-P provision to residential-only services precludes the necessary assurance of UNE-P availability for business customers. In addition, the UNE-P provision has low value because there is a restrictive ordering window for CLECs, and in any event, a duration too short to allow commercially viable planning by CLECs. Why would any rational enterprise plan entry when that method of entry may, at the option of the existing monopolist, become unavailable in a very short time? It is one thing for the Commission to recognize that UNE-P entry may (in some CLEC planning strategies) be a transitional tool, but the timing of that transition must not be placed in the hands of the monopolist threatened by that entry. Further, for many customers UNE-P may be more than just a transitional entry means; it may be the only means to sustain competitive service, at least for the foreseeable future.

Moreover, the contrived UNE-P "promotional opportunity" terminates as well once a pre-determined, limited number of lines are in service pursuant to the UNE-P promotion. Indeed, these caps apply to the <u>total</u> number of lines in the state receiving <u>either</u> of two promotions, one of which is the UNE-P promotion discussed here and one of which is a separate promotional resale discount. <u>See</u> Proposal ¶ 49. For instance, Ameritech need not offer any UNE-P promotions beyond the cap of 302,000 lines in service in Illinois --

just 7.8% of Ameritech's residential access lines in Illinois and 3.9% of all access lines in Illinois.[29] Given that there must be a UNE-P obligation for <u>all</u> lines, the caps are especially repugnant. They are in any event so low and so limited (for example, they are subject to lines taken in a completely separate promotion) as to preclude competitively significant activity.

Further, these limited "promotions" mask the fundamental problem of the failure of SBC and Ameritech to have established TELRIC-based UNE prices in their operating areas. Here, paragraph 44 of the proposal allows the Chief of the Common Carrier Bureau to give a notice of concerns regarding unlawful pricing, and to trigger some unspecified state filing by SBC. This is a mere reiteration of current

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[29] These percentages were derived by dividing the number of "promotional" lines available in each state by (1) the total number of Ameritech's residential access lines in the state and (2) the total business and residential access lines in the state respectively, as specified in the "Statistics of the Local Exchange Carriers 1997" published by USTA (reflecting 1996 totals) ("USTA Report"). The following are the numbers of "promotional" lines and corresponding percentage of residential access lines in the remaining Ameritech and SBC states (or multi-state regions when not disaggregated by state), followed by the corresponding percentage of total access lines in those states or multi-state regions: Indiana 104,000 (7.7%/3.1%); Michigan 252,000 (7.7%/4.2%); Ohio 200,000 (7.7%/2.9%); Wisconsin 102,000 (7.3%/3.2%); California 799,000 (8.0%/3.7%); Nevada 17,000 (8.7%/1.6%) (the 17,000 cap also represents 5.5% of SBC's total business and residential access lines in Nevada); Connecticut 114,000 (7.9%/5.1%); SWBT 786,000 regionwide (Arkansas 49,000; Kansas 68,000; Missouri 127,000; Oklahoma 84,000; and Texas 458,000) (8.2%/3.5% regionwide). Importantly, these percentages do not reflect recent increases in access lines nationwide, thereby likely resulting in overstated percentages.

responsibility and authority, and offers no solace to the public that has been awaiting SBC's compliance with TELRIC for years now.

In addition, and critical to the full deployment of advanced services, the UNE-P obligation must also extend to any xDSL UNE-platform. In any central office where SBC (or any of its regulated or unregulated affiliates) has begun to offer xDSL services, then for all loops served by that central office, SBC shall make available the xDSL network elements (including all DSL functionalities such as DSLAMs) on a combined basis as a UNE-Platform. This obligation is in addition to and independent of the obligation of SBC to make individual UNEs available or its obligation to make its xDSL retail services available at a wholesale discount. By making the DSL UNE-P available to competitors, consumers (business and residential) will have a greater array of service choices based upon xDSL technologies.

Sprint's Proposed Language:

"Each ILEC shall provide unrestricted availability of combinations of such UNEs, including the UNE-Platform or UNE-P without any non-cost-based non-recurring charges, sunset period (other than as stated herein), 'glue' charge, or geographic restrictions, consistent with 47 C.F.R. § 51.315, AT&T Corp. v. Iowa Utilities Board and other applicable law. As used herein, the UNE-Platform or UNE-P means access to the combination of UNEs necessary to provide a telecommunications service at the total element long-run economic cost (TELRIC) of such UNEs.

In any central office where the ILEC (or any of its regulated or unregulated affiliates) has begun to offer xDSL services, then for all loops served by that central office, the ILEC shall make available the xDSL network elements (including all DSL functionalities such as DSLAMs) on a combined basis as a UNE-Platform. This obligation is in addition to and independent of the obligation of the ILEC to make individual UNEs available or its obligation to make its xDSL retail services available at a wholesale discount."

F. Best Practices/MFN

SBC and Ameritech claim that their most-favored nation ("MFN") provision for out-of-region arrangements will ensure that their in-region markets will be the most open in the nation.[30] In addition, they claim that their MFN for in-region arrangements will provide all CLECs seeking to enter in-region with additional options for entering those markets. Closer examination of these two proposed conditions, however, reveals how truly empty the Applicants' promises are.

For example, the out-of-region MFN proposal makes available in-region only those interconnection arrangements

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[30] Ex Parte Letter from Richard Hetke, Senior Counsel, Ameritech, and Paul K. Mancini, General Attorney and Assistant General Counsel, SBC, to Magalie Roman Salas, Secretary, FCC, July 1, 1999, at 3 ("July Letter").

or UNEs that (1) were obtained through arbitration initiated by SBC or Ameritech under Section 252 and (2) had not previously been made available to any other CLEC by that out-of-region ILEC. Proposal ¶ 51. To Sprint's knowledge, the RBOCs and GTE thus far have generally entered into interconnection agreements out-of-region pursuant to an election under Section 252(i), rather than pursuant to Section 252(b) arbitrations. This is not surprising, since adopting other CLECs' existing interconnection agreements allows an RBOC CLEC to avoid taking positions inconsistent with those taken by the RBOC ILEC during negotiations with unaffiliated CLECs. Accordingly, to the extent that SBC or Ameritech opt into, for example, AT&T's interconnection agreement in Portland or Boston, the Applicants will not have to make those terms available in-region because (1) they are not obtained "through arbitration initiated by the SBC/Ameritech out-of-region CLEC." See id. ¶ 51. Moreover, the terms would also be excluded under the second prong of paragraph 51, because they would have been "previously made available to [another] CLEC by that incumbent LEC." Id.

Other artificial limitations also apply to both the out-of-region and in-region MFNs. For example, both conditions expressly apply only to "any interconnection arrangement or UNE." Id. ¶¶ 51-52. Thus, it is not clear whether other terms, such as those obtained pursuant to Sections 251(c)(4) or (c)(6), are included. The Applicants also retain the ability to argue that a particular term or condition is infeasible "given [certain] technical, network and OSS attributes and limitations," or that it is inconsistent with the legal and regulatory requirements of a particular state. Id. ¶ 51.

The in-region MFN attaches additional restrictions. Two limitations are most troubling: (1) the condition applies only to terms voluntarily negotiated (2) by SBC or "any other entity that at all times during the interconnection agreement negotiations was a subsidiary of SBC." Id. ¶ 52. First, problems arise during Section 252(a) negotiations not when Sprint wants a term or condition that the ILEC has already voluntarily agreed to elsewhere, but rather when Sprint seeks to incorporate a term that it has successfully obtained through arbitration in another state. Yet this situation is expressly carved out by the condition. Second, the language precludes CLECs from getting the benefit of Ameritech's prior agreements. As Sprint has previously demonstrated, such a limitation is particularly suspect here, where SBC is notorious for spreading its "degraded practices" to the acquired BOC's territory post-merger.[31]

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[31] In a memorandum dated April 1, 1999, Sprint provided a collection of anecdotes demonstrating the spread of such "degraded practices" after the SBC/Pacific Telesis and Bell Atlantic/NYNEX mergers. See "Post-merger Examples of the Spread of Degraded Practices in the Acquired BOC's Territory and Worsening Conditions in the Acquiring BOC's Territory," Willkie Farr & Gallagher Memorandum (ex parte, filed Apr. 1, 1999).

Moreover, even if a CLEC sought to obtain a voluntarily negotiated term, rather than an arbitrated one, other limitations further reduce the usefulness of this condition. For example, the condition requires the CLEC to "accept[] all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement." Proposal ¶ 52. There are numerous problems with this requirement. First, the phrase "reasonably related" is nowhere defined in the proposal. Second, BOCs, including SBC and Ameritech, routinely require requesting parties to sign nondisclosure agreements regarding their negotiations. Accordingly, the only entity that will have knowledge about what, if any, terms are "reasonably related" to a selected term will be SBC and Ameritech. Thus, SBC and Ameritech could unilaterally determine what other terms are "reasonably related," and forestall a CLEC's request for that term by insisting upon acceptance of the other "related" terms. At that point, the CLEC might have little recourse but to accept the entire package of "reasonably related" terms or pursue arbitration (presumably what the condition was designed in part to avoid in the first instance). In addition, a CLEC may only obtain voluntarily negotiated terms contained in agreements approved <u>after</u> the merger closing date. <u>Id.</u> This limitation -- coupled with the exclusion of Ameritech's interconnection agreements discussed above -- automatically exempts terms contained in the hundreds, if not thousands, of interconnection agreements negotiated since the passage of the Act.

Overall, a careful parsing of the proposed MFN language reveals just how limited the Applicants' commitment to opening their local markets is. While not surprising, given that the conditions were crafted by the parties against whom others will seek enforcement, the Commission must nonetheless attempt to ensure that SBC's and Ameritech's in-region markets will be truly open. Sprint believes that the following condition would accomplish that objective.

Sprint's Proposed Language:

"Each ILEC (defined as each operating company of the merging parties) shall make available to any requesting CLEC any term or condition that it (or any of its LEC affiliates) is obligated to provide to a CLEC under an existing interconnection agreement, arbitration decision or other state ruling throughout the SBC region. Such term or condition shall be treated as if it were a term or condition subject to Section 252(i) obligations, shall be made available within 30 days of the request, and thereafter subject to regulatory approvals, as necessary, pursuant to Sections 251 and 252 of the Act."

Such a condition would hold SBC and Ameritech to their promises of "best practices" and to their claims that benchmarking can be used to improve the performance of even commonly owned ILECs. Absent meaningful changes to the Applicants' proposed MFN language, the only accommodation of the concern for loss of benchmarking posed by the merger -- a specific concern expressly identified by Chairman Kennard and the Commission staff -- is paragraph 56's ARMIS reporting requirement.

G. Operations Support Systems

The proposed OSS conditions suffer from serious and numerous flaws. First, the OSS commitments are substantively deficient. For example, the commitments to develop and deploy interfaces, to provide direct access to order processing systems, and to make enhancements to Electronic Bonding Interfaces ("EBI") apply only to resold services, "UNEs that meet the requirements of 47 U.S.C. § 251(c)(3)," and UNEs or UNE combinations that are required by the proposal. See Proposal ¶¶ 9, 10. No mention is made of local number portability or facilities required for interconnection such as interconnection trunks. Yet both LNP and interconnection facilities can and should be supported by the OSS functionalities at issue. Further, it is not at all clear who gets to decide which UNEs "meet the requirements of 47 U.S.C. § 251(c)(3)," potentially leaving SBC to determine its own legal obligations.

Second, the OSS commitments offer virtually endless opportunities for SBC/Ameritech to delay implementation, just as Bell Atlantic/NYNEX has done with the OSS-related requirements imposed by the Commission as a condition of its approval of that merger. For example, SBC/Ameritech states that it will have developed and deployed uniform interfaces for all of its states other than Connecticut "[w]ithin 24 months of the Merger Closing Date (assuming the duration of Phase 2 described below is no longer than 1 month)." Id. ¶ 9.[32] But as the Bureau no doubt realizes, there is little chance that Phase 2, as proposed by SBC/Ameritech, will be completed within one month. During that phase, CLECs and SBC are to try to reach written agreement on SBC/Ameritech's plan for developing and deploying uniform interfaces and a change management process. SBC/Ameritech of course has no incentive to devise a plan that meets the needs of competitive entrants into SBC/Ameritech's core business and no incentive to fix the plan during the one-month workshop contemplated by Phase 2. Issues that cannot be resolved during the one-month workshop (and there are likely to be many) must be submitted to the Chief of the Common Carrier Bureau, who must decide whether an issue should be resolved in SBC/Ameritech's favor or submitted to binding arbitration.

Given the complexity of the OSS issues, the review at the Bureau level is likely to take months. If, as is likely, arbitration is needed, the process would stretch out many more months. SBC/Ameritech has included no timeframe for the arbitration process (and the American Arbitration

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[32] In Connecticut the target is 30 months from the merger closing date, again assuming the duration of Phase 2 is longer than one month. See id.

Association ("AAA") rules provide none),[33] and, again, SBC/Ameritech will have a powerful incentive to drag the process out as long as possible. Moreover, even before arbitration could begin, an arbitrator or panel of arbitrators and subject matter experts must be chosen, decisions that are likely to be contentious.[34] If not an expert in the area, the chosen arbitrator (or panel) would then be forced to learn about OSS, an arcane area even to those generally familiar with telecommunications issues. SBC/Ameritech would then exploit every opportunity to confuse matters and delay the process. Thus, far from lasting one month, the Phase 2 process seems more likely to last longer than a year (and even longer in Connecticut).

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33 SBC/Ameritech states that arbitration should be conducted in accordance with the AAA's Commercial Arbitration Rules. See id. ¶¶ 11.b, 11.c, 14.b, 14.c, 15, 16.c(2) & 16.c(3). Those rules do include "Expedited Procedures." See Commercial Dispute Resolution Procedures, As Amended and Effective on Jan. 1, 1999 at Section E. However, Expedited Procedures are to be used only in cases where no claim or counterclaim exceeds $75,000, or where the parties agree to use them, or where the AAA determines that they should be used. See Rule E-1. But the claims at issue here exceed the $75,000 limit, SBC/Ameritech is unlikely to agree to use the Expedited Procedures and, in any event, arbitrators with little or no relevant technical expertise would probably not agree to proceed on an expedited basis. Thus, it is likely that the AAA's generic Commercial Arbitration Rules or its Optional Procedures For Large, Complex Commercial Disputes would be used. Those rules do not have specific time limits for the duration of arbitration and it would prove very difficult to impose such a limit on SBC/Ameritech.

34 Numerous other issues arise with regard to the fundamental unfairness of SBC's procedural proposals, e.g., its ability to dictate the three firms from which subject matter experts are selected, as discussed infra pages 50-54.

Phase 3 would also last much longer than SBC/Ameritech indicates. During Phase 3, SBC/Ameritech is to develop and deploy the interfaces, enhancements, and business requirements as determined in Phase 2. The completion target date for Phase 3 is 18 months after completion of Phase 2 for all states other than Connecticut, where the completion date is 24 months after the completion of Phase 2. See id. ¶ 11.c. But the Phase 3 implementation process proposed by SBC/Ameritech offers numerous opportunities for delay. To begin with, SBC/Ameritech will likely use the full 18 months to complete its work. According to the SBC/Ameritech proposal, if a CLEC believes that SBC/Ameritech has not complied with the requirements established in Phase 2, it must notify the Chief of the Common Carrier Bureau and request arbitration. The Bureau Chief may then submit the issues raised by the CLEC to binding arbitration. As in Phase 2, Bureau review and the arbitration process could last a year or longer. In total, Phase 3 could easily last as long as 30 months (18 months before the target date plus 12 months for dispute resolution), and of course longer in Connecticut.

The financial penalties for failure to meet the target date in Phase 3 will not prevent such delay. As long as SBC/Ameritech files a notice "regarding its satisfaction of [the] target with the Secretary of the Commission" within 18 months, the financial penalties ($100,000 per business day) for failure to meet the Phase 3 target date begin only after an arbitrator issues a final order concluding that SBC/Ameritech has failed to meet its obligations. See id.[35] There is nothing to prevent SBC/Ameritech from fixing an obvious problem during the arbitration process, thus avoiding any penalties. In any event, where the Phase 2 requirements are deemed to be ambiguous, an arbitrator may very well decide not to impose the financial penalties while SBC/Ameritech fixes a problem.

Thus, it seems likely that the process for developing and deploying uniform interfaces will last about four years (five months for Phase 1, plus 12 months for Phase 2, plus 30 months for Phase 3), or even longer. That length of time makes the commitment to establish uniform OSS essentially irrelevant for CLECs' business planning purposes. CLECs simply cannot wait four years to establish OSS connections with SBC/Ameritech. The requirement would be a dead letter.

The other OSS-related commitments described in the proposal offer similar opportunities for delay. The offer to provide direct access to order processing systems, including those for xDSL and advanced services, contains no deadline for implementation and no penalties for failure to meet commitments made to CLECs. See id. ¶¶ 12, 16.b. The

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[35] These penalties can also apply after the date SBC/Ameritech "acknowledges" its failure to meet the requirements established in Phase 2. See id. Of course, such acknowledgment is highly unlikely. In any event, SBC/Ameritech would acknowledge failure only in situations where it can avoid financial penalties by fixing the problem immediately.